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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 300, Misc.

STATE OF MARYLAND,
Petitioner,

vs.

THE BALTIMORE RADIO SHOW, INC.,
a body corporate,
WFBR;
THE BALTIMORE BROADCASTING CORPORATION,
a body corporate,
WCBM;
MARYLAND BROADCASTING COMPANY,
a body corporate,
WITH;
and
JAMES P. CONNOLLY,
Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

TO THE HONORABLE, THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, the State of Maryland, respectfully prays that a Writ of Certiorari may issue to review the final decision of the Court of Appeals of Maryland in this matter:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED

During the early afternoon of July 6, 1949, Marsha Brill, an eleven year old girl was brutally stabbed to death by an unidentified man in the northwestern section of Baltimore City while she was at play with two other young children. Because of the atrociousness of the crime, great public interest was aroused and parents residing not only in the vicinity but also throughout the City became greatly concerned for the safety of their children (R. 21, 87, 152). At about 10:45 P. M. on the same day, Eugene H. James, a Negro citizen, was arrested and held for investigation in connection with this horrible crime (R. 21, 87, 152). On the afternoon of July 8, 1948, Eugene H. James was taken to the scene of the crime, at which time he made an oral statement admitting his guilt and directed the police to the spot where he had buried the knife with which the murder was committed (R. 21, 87, 152-153). Later that same night he executed a written confession (R. 21-22, 88, 153). At about 6:00 P. M. on July 8, 1949, James was formally charged with murder and on July 9, 1948, he was indicted by the grand jury for the murder of Marsha Brill and for the assault and rape of a white woman which had occurred some weeks before Marsha Brill was murdered (R. 22, 88, 153).

Against the background of the intense city-wide public interest and concern generated by this pointless, brutal slaying of an eleven year old girl, the Respondents, on the basis of certain information obtained by them from a news service, which had been obtained and verified in part by an employee of the news service from the then Commissioner of Police of Baltimore City made broadcasts from within the City of Baltimore disclosing that Eugene H. James had been

charged with the murder by stabbing of eleven year old Marsha Brill; that he had admitted his guilt of the Brill murder and another recent assault in the same area; that he had shown the police where he had buried the murder weapon; that he had been charged or suspected in past years with a series of assaults and that he had been sentenced to the Maryland Penitentiary sometime before for an attack on a ten year old child; that he was of normal mentality and was not an obvious "mental case"; that he had a past criminal record and that he had served part of a ten year sentence for a series of stabbing attacks on women in North Baltimore (R. 23-27, 101-104, 146-151). All of these broadcasts were made after James had been formally charged with the murder of Marsha Brill and the broadcasts were capable of being heard throughout the City of Baltimore (a political subdivision separate from any of the Counties of Maryland) and in many of the Counties of the State of Maryland and even outside of the State, and, in fact, were heard by a substantial but indeterminate number of listeners (R. 28, 90, 155). Thus, the broadcasts originated from, were centered in and entirely saturated the political subdivision in which jurisdiction to try James for the murder of Marsha Brill was lodged and from which the jurors would be selected to constitute the jury which was guaranteed to James by Articles 20 and 21 of the Declaration of Rights of the State of Maryland.

At his arraignment on the indictment for murder on July 13, 1948, James, through counsel, pleaded not guilty and not guilty by reason of insanity (R. 22, 88, 153). He submitted to trial before the Criminal Court of Baltimore upon a waiver of a jury trial, because as explained by his counsel, "I felt that, inasmuch as it was common knowledge throughout the City that James had, allegedly, made a confession, and that he had been previously convicted for crimes somewhat

similar to his then present indictment, I did not feel that I could have picked a jury that had not been infected, so to speak, by the knowledge of this man's confession and his criminal background" (R. 34, 106, 173). In the Court of Appeals, the Maryland Civil Liberties Committee, Inc., notwithstanding that its parent organization took an opposite view, termed the broadcasts "inflammatory and, when heard by an intense audience waiting for something to happen—highly dangerous to the accused". During the course of his trial before the Court sitting as a jury, evidence was presented, through the testimony of psychiatrists relating to his mental capacity, that he was mentally competent and that he had a past criminal record; and on the basis of such testimony, his confession was admitted into evidence (R. 22, 88, 153). James was found guilty of murder in the first degree; and, after a motion for a new trial had been denied by the Supreme Bench of Baltimore City, he was sentenced to capital punishment. He appealed to the Court of Appeals of Maryland on the sole question as to the admissibility of his confession, and the judgment of the trial court was affirmed, *James v. State*, ... Md. ....., 65 A. (2d) 888 (1949).

On July 20, 1948, some eleven days after the broadcasts in question, two Judges of the Criminal Court of Baltimore issued citations charging the Respondents with contempt for having made the broadcasts made by them, thus embarrassing and obstructing the administration of justice (R. 5, 76, 146). By appropriate motions of all of the Respondents, these citations were particularized with respect to the broadcasts alleged to have been made; and, further, it was stated on behalf of the Court that the citations were based upon violation of a rule of the Supreme Bench of Baltimore City and also upon the general power and authority of the

Court to issue citations for contempts for the protection of a prisoner's right to a fair trial (R. 7-9, 77-81, 146-151).

Each of the Respondents, prior to submitting to trial on the citations thus issued, by appropriate pleadings, asserted that the making of the broadcasts by each of them was within the protection of the First Amendment to the Constitution of the United States as made applicable to the States by the Fourteenth Amendment; that each of the broadcasts was removed from regulatory action by the State of Maryland by the Commerce Clause of the Constitution of the United States and that the rule of the Supreme Bench of Baltimore City upon which the citations in part had been issued was invalid and unconstitutional (R. 9-13, 75, 82-86). Other defenses founded solely upon the basis of State law were also interposed. By Order of the Chief Judge of the Court of Appeals of Maryland, a Judge (not a member of the Supreme Bench of Baltimore City) from Calvert County, in rural Southern Maryland, was designated to try the Respondents' cases (R. 15-16). The cases were tried together upon Agreed Statements of Fact and the testimony of James' counsel and the testimony of an editor of a local newspaper. All of the Appellants were found guilty of contempt of court and were fined in amounts ranging from $100.00 to $500.00.

Following their convictions, the Respondents each appealed to the Court of Appeals of Maryland making many contentions based on both State and Federal law that their convictions could not be permitted to stand. In the Court of Appeals the cases were consolidated, heard together and one opinion filed. The Court of Appeals (one Judge dissenting), by its Opinion and Judgment filed June 9, 1949, resolved all issues of State law against the Respondents;

but solely upon its misinterpretation of the opinions of this Honorable Court, found that the boardcasts made by them were within the protection of the First Amendment to the Constitution of the United States, as made applicable to the States by the Fourteenth Amendment; and, accordingly, reversed the convictions (R. 210-231). The Court of Appeals did not deal with the Respondents' contention that the State of Maryland was prohibited by the Commerce Clause of the Constitution of the United States from taking disciplinary action by reason of the contents of the Respondents' boardcasts.

II.

JURISDICTIONAL STATEMENT

Petitioner brings this Petition pursuant to Section 1257 (3) of Revised Title 28 of the United States Code.

A writ of Certiorari is sought to review the final decision entered on June 9, 1949, in the Court of Appeals of Maryland, which is the highest Court of the State of Maryland, in the consolidated cases in the October Term, 1948, of that Court entitled No. 170, *The Baltimore Radio Show, Inc., a body corporate; WFBR vs. State of Maryland;* No. 171, *The Baltimore Broadcasting Corporation, a body corporate, WCBM vs. State of Maryland;* and No. 172, *Maryland Broadcasting Company, a body corporate, WITH, and James P. Connolly vs. State of Maryland.*

The nature of the case and the rulings below which bring the case within the jurisdictional requirement of Section 1257 (3) appear from the following:

In the citations for contempt, it was specifically asserted on behalf of the Petitioner that the acts of the Respondents embarrassed and obstructed the administration of justice (R. 5, 76, 146). When these charges were particularized, it

was stated on behalf of the Petitioner that disciplinary action was being sought "for the protection of a prisoner's right to a fair trial" (R. 9, 81, 151). Thus, it appeared at the outset that the basis for the citations for contempt was an effort on the part of the State of Maryland to insure to Eugene H. James, the accused, the procedural due process of law guaranteed him by the Fourteenth Amendment to the Constitution of the United States and particularly with respect to his right to a "trial by an impartial jury" of the facts "where they arise", as guaranteed him by Articles 20 and 21 of the Declaration of Rights of the State of Maryland. Opposed to these claims, the Respondents asserted that the broadcasts made by them were within the protection of the guarantees embodied in the First Amendment to the Constitution of the United States, as made applicable to the States by the Fourteenth Amendment thereto. Also the Respondents asserted that the State of Maryland was prohibited by the Commerce Clause of the Constitution of the United States from taking disciplinary action with respect to the contents of radio broadcasts made by the Respondents in interstate commerce (R. 9-13, 75, 82-86).

The trial court, by its oral opinion, ruled that State regulation of the contents of radio broadcasts was not prohibited by the Commerce Clause of the Constitution of the United States or the Federal Communications Act of 1935, that the freedom of speech and of the press guaranteed by the First Amendment to the Constitution of the United States, as made applicable to the States by the Fourteenth Amendment thereto, did not override the right of the accused, Eugene H. James, to a trial by an impartial jury, and that the broadcasts constituted not only a "clear and present" danger to James' right to a trial by an impartial jury but constituted *an actual abridgment* of that right (R. 51-72, 119-140, 184-204).

On appeal, the same claims were made by all parties and the Court of Appeals, the highest Court of the State of Maryland, held (one Judge dissenting) *solely under the self-imposed compulsion of an erroneous construction of the decisions of this Honorable Court* that the broadcasts made by the Respondents did not constitute even a "clear and present danger" to James' right to trial by an impartial jury and hence were within the protection guaranteed by the First Amendment of the Constitution of the United States, as made applicable to the States by the Fourteenth Amendment thereto; and, therefore, the State of Maryland was without power to impose disciplinary action with respect to those broadcasts (R. 210-231). The Court of Appeals found it unnecessary to consider the Respondents' claim that disciplinary action on the part of the State of Maryland was also prohibited by the Commerce Clause of the Constitution of the United States.

The claim thus asserted by Petitioner and denied by the Courts of the State of Maryland is that the Petitioner, in meeting the obligation imposed on it to afford procedural due process of law to an accused in the exercise of his right to a trial by an impartial jury in the place where the facts arose, may discipline the making of radio broadcasts calculated to obstruct and deny that right. This claim was denied by the Court of Appeals of Maryland. In effect, the highest Court of the State of Maryland, acting solely under the compulsion of its misconstruction and misinterpretation of the decisions of this Court relating to freedom of speech and freedom of the press, as is more fully shown in the brief in support of this Petition, has denied to the State of Maryland the right to guarantee an accused a jury trial by his peers of the vicinage. This holding has been made in the face of the declaration of this Court that if a State under-

takes to afford a right to trial by jury that right is protected by the Fourteenth Amendment to the Constitution of the United States and the State is bound to observe the limitations and protections contained therein.

The following cases, among others, sustain the jurisdiction of this Court when a State claims that it may properly take disciplinary action against the makers of such publications because of their destruction of the fair and impartial administration of justice and where, as a defense to punishment for contempt of court, it is asserted that publications are protected by the First and Fourteenth Amendments to the Constitution of the United States: *Bridges v. California*, 314 U. S. 252 (1941); *Pennekamp v. Florida*, 328 U. S. 331 (1945); *Craig v. Harney*, 331 U. S. 367 (1946).

III.

QUESTIONS PRESENTED

The questions for review upon certiorari are:

(1) Do the First and Fourteenth Amendments to the Constitution of the United States prohibit the imposition of disciplinary action upon the Respondents by the State of Maryland for abridging the right of trial by an impartial jury in the place where the facts arise, as guaranteed by Articles 20 and 21 of the Maryland Declaration of Rights, where the Respondents made broadcasts of the nature and under the circumstances involved herein?

(2) Is the State of Maryland, in order to prevent a denial of due process of law, or to punish its actual denial (namely the right to a trial by an impartial jury within the area where the facts arise) prohibited by the First and Fourteenth Amendments to the Constitution of the United States from disciplining the making of publications which clearly

and presently tend to nullify or, in fact, do nullify that right?

(3) Do the broadcasts made by the Respondents under the circumstances involved herein fail to meet, at least, the "clear and present danger" test, required as a condition precedent to a limitation upon freedom of speech and freedom of the press?

The Court of Appeals of Maryland, in reversing the judgment of the Criminal Court of Baltimore, in effect found in the affirmative as to all the above questions.

In these findings and conclusions, it is submitted there was error.

IV.

REASONS FOR GRANTING THE WRIT

Reasons relied on for the allowance of a Writ of Certiorari in this case are summarized as follows:

(1) The Court of Appeals of Maryland decided a Federal question of substance not theretofore determined by this Court. It was that the making of the radio broadcasts involved herein can not be subjected to disciplinary action, although those broadcasts were found by the trier of the facts to have actually denied a trial by an impartial jury where the facts arose. Although this Court has outlined the boundaries of permissible punishment when the effect of publications, if any, is upon the judiciary, it has not considered the extent to which a State may discipline the making of publications, the effect of which is directly and solely upon the segment of the population of that State from which a jury will be chosen. The substantial nature of this question and its importance to the public are amply demonstrated by the fact that, in the Court of Appeals of Mary-

land, there appeared, *inter alia*, as amicus curiae an organization (The National Association of Broadcasters) representing over 1900 radio broadcast licensees and an association (American Newspaper Publishers Association) representing more than 780 newspaper publishers, whose papers represent approximately ninety percent of the total daily and Sunday circulation of newspapers published in the United States. In support of the disciplinary action taken by the State of Maryland, there appeared in the Court of Appeals as additional amicus curiae, the two largest bar associations of the City of Baltimore and the Maryland Civil Liberties Committee, Inc.; while the American Civil Liberties Union, Inc., The American Society of Newspaper Editors and The A. S. Abell Company (publisher of the Baltimore Sun) appeared in opposition thereto. There is a pressing need for an adjudication of the conflicting claims of (i) the alert and faithful attempt of the State of Maryland to perform its duty to guarantee, and to punish for a denial of, procedural due process of law to a member of a minority group accused of an atrocious crime and (ii) the right of radio broadcasters and newspaper publishers to publish information having a serious and imminent threat to, if not actually denying, that right.

(2) The Court of Appeals of Maryland has decided a Federal question in a way not necessarily, or even logically, in accord with applicable decisions of this Court in that the Court of Appeals has applied the rules laid down in *Bridges v. California, supra, Pennekamp v. Florida, supra,* and *Craig v. Harney, supra,* all of which concerned alleged obstructions to the fair and impartial administration of justice aimed at the judiciary, to such obstructions aimed at juries and prospective juries, notwithstanding that the rules of the aforesaid cases rest substantially, if not exclusively,

upon the difference in resistance to outside influences between a member of the judiciary and an ordinary lay member of the public.

(3) The Court of Appeals of Maryland has decided that the State of Maryland is without authority effectively to guarantee procedural due process of law as applied to the right of trial by an impartial jury, and has held that the State of Maryland may take disciplinary action only in such cases as it affirmatively appears that an accused suffered actual prejudice, in the trial afforded him, sufficient to vitiate his conviction. Thus, the Court of Appeals has decided that the State of Maryland is without power to protect the administration of justice to the extent necessary to insure a trial by an impartial jury, and can do nothing except in those cases where the conviction of an accused amounts to a denial of due process of law; notwithstanding that the State of Maryland is required, under the Constitution of the United States, to afford procedural due process of law to all persons accused of crime, over and above a forebearance to punish such persons as a result of a trial in which procedural due process of law is actually and substantially denied.

V.

TRANSCRIPT OF RECORD AND SUPPORTING BRIEFS

Petitioner submits with this Petition a certified copy of those portions of the record which were printed for the use of the Court of Appeals below and a printed transcript of the record of proceedings in the Court of Appeals of Maryland, together with a brief in support of this Petition.

WHEREFORE, your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of

this Honorable Court, directed to the Court of Appeals of Maryland, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the consolidated cases numbered and entitled on its docket as No. 170, October Term, 1948, *The Baltimore Radio Show, Inc., a body corporate, WFBR, vs. State of Maryland;* No. 171, October Term, 1948, *The Baltimore Broadcasting Corporation, a body corporate, WCBM, vs. State of Maryland;* and No. 172, October Term, 1948, *Maryland Broadcasting Company, a body corporate, WITH, and James P. Connolly, vs. State of Maryland;* and that the said judgment of the Court of Appeals of Maryland may be reversed by this Honorable Court and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your Petitioner will ever pray.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINION IN THE COURT BELOW

The opinion of the Court of Appeals of Maryland has not yet been reported officially. It appears at ..... A. 2d ....., and at pages 210-231 of the Record.* The opinion of the

* The term "Record" and the symbol "R." shall be used to refer to the printed portions of the Record as filed by the Respondents in the Court of Appeals of Maryland, and the proceedings in and opinion of that Court, and submitted herewith by the Petitioner in sufficient number to supply each of the Justices of this Court with a copy.

Criminal Court of Baltimore was an oral one and appears at pages 51-72, 119-140, 184-204 of the Record.

JURISDICTION

The statutory provision is Section 1257(3) Revised Title 28, U. S. Code.

The final decision of the Court of Appeals of Maryland, reversing the judgments of the Criminal Court of Baltimore, was entered on June 9, 1949. The Court of Appeals of Maryland is the court of last resort for the State of Maryland; and as such meets the test of Section 1257(3) Revised Title 28, U. S. Code, and Rule 38 of this Court.

JURISDICTIONAL STATEMENT

The nature of the case and the rulings below which bring the case within the jurisdictional requirement of Section 1257(3) appear from the following:

In the citations for contempt, it was specifically asserted on behalf of the Petitioner that the acts of the Respondents embarrassed and obstructed the administration of justice (R. 5, 76, 146). When these charges were particularized, it was stated on behalf of the Petitioner that disciplinary action was being sought "for the protection of the prisoner's right to a fair trial" (R. 9, 81, 151). Thus, it appeared at the outset that the basis for the citations for contempt was an effort on the part of the State of Maryland to insure to Eugene H. James, the accused, that due process of law guaranteed him by the Fourteenth Amendment to the Constitution of the United States and particularly with respect to his right to a "speedy trial by an impartial jury", who should try the "facts where they arise" as guaranteed him by Articles 20 and 21 of the Declaration of Rights of the Constitution of Maryland. Opposed to these claims, the Respondents asserted that the broadcasts made by them were

within the protection of the guarantees embodied in the First Amendment to the Constitution of the United States, as made applicable to the States by the Fourteenth Amendment thereto. Also the Respondents asserted that the State of Maryland was prohibited by the Commerce Clause of the Constitution of the United States from taking disciplinary action with respect to the contents of radio broadcasts made by the Respondents in interstate commerce (R. 9-13, 75, 82-86).

The trial court, by its oral opinion, ruled that State regulation of the contents of radio broadcasts was not prohibited by the Commerce Clause of the Constitution of the United States or the Federal Communications Act of 1934 (R. 70-71, 138-139, 203-204), that the freedom of speech and of the press guaranteed by the First Amendment to the Constitution of the United States, as made applicable to the States by the Fourteenth Amendment thereto, did not override the right of the accused, Eugene H. James, to a trial by an impartial jury (R. 54, 122, 187), and that the broadcasts constituted not only a "clear and present" danger to James' right to a trial by an impartial jury but an actual abridgment of that right (R. 61, 129, 194).

On appeal, the parties maintained their respective contentions and the Court of Appeals, acting solely under the self-imposed compulsion of an erroneous construction of the decisions of this Honorable Court, held, (one Judge dissenting) that the broadcasts made by the Respondents did not constitute even a "clear and present *danger*" to James' right to trial by an impartial jury where the facts arose, and so were within the protection guaranteed by the First Amendment of the Constitution of the United States (R. 231). As a result, the State of Maryland was held to be without power to impose disciplinary action with respect to the broadcasts. The Court of Appeals found it unneces-

sary to consider the Respondents' claim that disciplinary action on the part of the State of Maryland was also prohibited by the Commerce Clause of the Constitution of the United States.

The claim thus asserted by Petitioner, and denied by the Court of last resort of the State of Maryland, is that the Petitioner, in meeting the obligations of its Constitution and the Constitution of the United States to afford due process of law to an accused in the exercise of his right to a trial by an impartial jury where the facts arose, unless he freely and voluntarily elects otherwise, may discipline the making of radio broadcasts calculated plainly to obstruct and deny that right. In effect, the highest Court of the State of Maryland, obviously acting reluctantly under the compulsion of its misconstruction and misinterpretation of the decisions of this Court relating to freedom of speech and freedom of the press, as is more fully shown hereinafter, has denied to the State of Maryland the right to guarantee and insure due process of law with respect to an accused's right to a trial by an impartial jury. This holding was made in the face of the declarations of this Court that if a State undertakes to afford a right to trial by jury that right, and its observance by the State, both explicit and implicit, is protected by the Fourteenth Amendment to the Constitution of the United States.

The following cases, among others, sustain the jurisdiction of this Court when a State claims that it may properly take disciplinary action against the makers of such publications because of their destruction of the fair and impartial administration of justice and when, as a defense to punishment for contempt of court, it is asserted that publications are protected by the First and Fourteenth Amendments to the Constitution of the United States: *Bridges v. California*, 314 U.S. 252 (1941); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Craig v. Harney*, 331 U.S. 367 (1947).

STATEMENT OF FACTS

All of the following facts were established in the Criminal Court of Baltimore by stipulation between the parties.

On the early afternoon of July 6, 1948, Marsha Brill, an eleven year old, white, female child was stabbed to death by an unidentified man in the northwestern section of Baltimore City while at play with two other children. Because of the atrocity of the crime, the entire Police Department of Baltimore City was alerted. Great public interest was aroused and parents residing not only in the vicinity of the crime but also throughout the City became greatly concerned for the safety of their children (R. 21, 87, 152).

At or about 10:45 P.M., on July 6, 1948, one Eugene H. James, a Negro citizen, was arrested at his home and was booked by the police "held for investigation" in connection with this crime. Soon thereafter, the police authorities learned of the fact that James had a past criminal record. On the morning of July 8, 1948, James signed a written statement admitting that he had assaulted and raped a certain woman in Baltimore City some weeks before the Brill murder (R. 21, 87, 152).

After periodic interrogations by the police from the time of his arrest, James was taken by the police, on the afternoon of July 8, 1948, to the scene of the Brill murder, at which time he had made an oral statement to police authorities admitting his guilt in the murder of Marsha Brill. During this trip, James directed the police to a place where he had buried the murder weapon, a knife, which place he had marked by a stone and a twig. All of these articles were taken by the police and held as evidence (R. 21, 87, 152).

At about 6:00 P.M. on July 8, 1948, James was formally charged, at the Northern Police Station of Baltimore City,

with the murder of Marsha Brill. At about 8:00 P.M. that night, the police commenced to take a written confession from James wherein he admitted the murder of Marsha Brill. That confession was signed by James at about 10:00 P.M. the same evening. On the morning of July 9, 1948, James was presented to and indicted by the grand jury of Baltimore City for the Brill murder and for the assault and rape of the woman previously mentioned. On July 13, 1948, at the arraignment on each of the two indictments in the Criminal Court of Baltimore, James, through counsel, entered a plea of not guilty by reason of insanity. On September 20, 1948, James submitted to trial before the Criminal Court of Baltimore *without a jury* on the indictment charging him with the murder of Marsha Brill under pleas of not guilty, not guilty by reason of insanity, not guilty by reason of insanity at the time of the commission of the murder, and not guilty by reason of insanity at the time of trial. At the conclusion of the trial, he was found guilty of murder in the first degree; and, after a motion for a new trial was denied by the Supreme Bench of Baltimore City, capital punishment was imposed on November 10, 1948 (R. 21-22, 88, 153). An appeal was taken to the Court of Appeals of Maryland based solely on the admissibility of James' confessions, which resulted in affirmance of the judgment entered on the verdict, *James v. State,* ..... Md. ....., 65 A. 2d 888 (1949).

During the James trial, both the oral and written confessions of James were admitted in evidence over vigorous objections by counsel for James and after lengthy arguments of counsel. Evidence introduced relative to the admissibility of James' statement included the testimony of five psychiatrists concerning James' mental capacity and condition at the time of the taking of the statement. In the

course of this medical testimony, the fact of James' previous convictions and incarceration was brought to the attention of the Court (R. 22, 88, 153).

On the evening of July 8, 1948, the information that the Brill case had been solved was reported to the night editor on the Baltimore desk of the United Press, Miss Mary Jane Taggert. She called Hamilton R. Atkinson, then Police Commissioner of Baltimore City, on the telephone at about 7:00 P.M. that evening. Miss Taggert explained that she was the representative of the United Press and that she intended to write a story embodying the information which he would either give or verify for her. During the course of this conversation, Commissioner Atkinson verified certain information which Miss Taggert already possessed concerning the James case and about which she questioned Commissioner Atkinson specifically, and he gave her certain additional information relative to the case. Later that evening Commissioner Atkinson was interviewed by the press outside his office at Police Headquarters and, in response to questions, gave further information regarding the James case. One of the reporters present at that interview represented United Press (R. 22-23, 89, 154).

Commissioner Atkinson does not recall the content of any specific conversation on the evening of July 8, 1948, with representatives of the press or of radio broadcasting stations; and, while he does not deny answering questions directed to him by such representatives, he is positive that he gave out no formal press release for publication (R. 23, 89, 154).

The information that the Brill case had been solved was also received on the evening of July 8, 1948, at the offices of the Respondent WITH; and at or about 7:00 P.M. that evening, the Respondent Connolly had a telephone conver-

sation with Commissioner Atkinson concerning the case. The script of the broadcast made by the Respondent Connolly over the facilities of the Respondent WITH was prepared by the Respondent Connolly between the time of that telephone conversation and the program broadcasted by the Respondent Connolly at 8:45 P.M. that same night (R. 153-154).

At 8:45 P.M., on July 8, 1948, the Respondent Connolly broadcast over the facilities of the Respondent WITH the following information:

> "Thank you, Gil, and good evening, everyone. Stand by for a sensation. After three days of unrelenting hard work on the part of every man in the department, the Baltimore police have just broken the Brill murder case—broken it wide open. Police Commissioner Hamilton R. Atkinson announced only a few moments ago that a man has been arrested and formally charged with the crime—the brutal and apparently pointless stabbing of eleven-year-old Marsha Brill in the Pimlico neighborhood Tuesday afternoon. The funeral of the little murder victim was held today and hundreds of persons attended. *The man now charged with the Brill girl's murder is Eugene James, a 31-year-old Negro and convicted former offender, whose home is at 3311 Paton Avenue, not far from the scene of the crime.*
>
> *"The police said James not only admitted the Brill murder and another recent assault in the same area but that he went over the scene of the crime with them late this afternoon and showed them where the murder weapon was buried. It turned out to be an old kitchen carving knife. Immediately after the finding of the knife the prisoner was taken downtown to police headquarters for a formal statement. The story of how James came to be charged with the Brill murder is an account of police work at its best. James was taken into custody yesterday mainly because of his record. Police remembered that he had been charged or suspected in past years with a series of assaults and that about ten*

years ago he was sentenced to the Maryland Penitentiary for an attack on a ten-year-old child. The police took into account also the fact that James' home was close to the scene of the Brill crime.

"James was questioned, along with other suspects, but no information of much importance was obtained from him until today. The police did not use any force, of course, but questioned him persistently. Then, this morning, according to the officers, James admitted an attack on a white woman recently in the same woods near where the Brill girl was slain. In that case, too, James used a knife but only to threaten his victim into submission. She was not otherwise injured. With more information supplied by James, police recovered the woman's pocketbook, which had been taken from her. Police said James was familiar with every foot of the ground on which offenses, the assault of the woman and the slaying of the girl, occurred. James is not an obvious mental case. Throughout all his questioning, said the police, he seemed, as they put it, 'quite Cute', in other words, wary. When James freely admitted the assault on the woman the police were encouraged and rendered their interrogation with renewed vigor. They felt that James had admitted the lesser assault only to throw the police off the main track, and the police felt they were close to a confession in the Brill case. They were, in fact.

"A few hours later the prisoner broke again and this time it was the break that broke the Brill case. James admitted that crime also and consented to accompany the police to the scene. On the ground, said the police, he made a more detailed admission. Among those who accompanied him to the scene of the crime were the highest ranking officers of the department. They were led by Commissioner Atkinson. With him were Chief Inspector M. Joseph Wallace, Inspector Joseph Itzel, who had directed the examination of James and other suspects, and Capt. Oscar Lusby, the comparatively new commander of the Northern Police District.

"The appearance of the high ranking police officials with an abvious suspect on the scene of the crime soon drew hundreds of idle spectators and for that reason the police did not linger on the ground any longer than necessary. Instead they took James and the evidence they had accumulated downtown to Police headquarters for a formal statement. From headquarters the prisoner was taken to the Northern station. He probably will be arraigned in Northern police court tomorrow.

"The first hint that the police were close to an important break in the Brill case came with word from an officer of rank at headquarters that, while no arrests had yet been made and no charges had been placed, the police felt they had a very good suspect. James was the suspect of course. *At that time he had not confessed the Brill crime, although he had admitted the earlier offense against the woman in the same neighborhood.* Since the break in the case came so late in the day, the police at first were inclined to postpone making the actual charge against James until tomorrow. In view of the intense interest in the case, however, and in view of the alarm and agitation among parents and children in the area in which the crime occurred, Commissioner Atkinson decided to make the charge and the announcement immediately in order to relieve anxiety among the families in the Pimlico area.

"The Police are deserving of the utmost commendation for the comparatively quick break in the case, and the commendation is merited by every man who worked on the assignment, from the highest to the lowest in the department. From the first Commissioner Atkinson personally took charge of the investigation. The hunt for the slayer promised to be a long, hard routine search. The killer had escaped from the scene despite a wide dragnet thrown around it soon after the alarm. Usually when an arrest is not made on or near the scene such cases develop into long, exhaustive investigations that end, usually, only when the police get

some favorable break. *In this case the officers made their own break by remembering James' record and taking him in hand promptly.* Had the police not been so alert and so prompt James might have fled the city. With the prisoner in hand, all the rest was accomplished by patient and skilled interrogation. Dozens of suspects were examined and released until the police felt reasonably sure that the lone man remaining in custody was the one they wanted.

"The police are to be congratulated. And it is tragic that all the community can do otherwise is commiserate with the bereaved family. Fifteen hundred dollars in reward money has been offered for the arrest and conviction of the Brill slayer, and the distribution of that money among these who have earned it remains to be decided. But, if I am not mistaken, the police do not consider themselves eligible for rewards.

"And now a brief pause. Here is our announcer, Gil Kriegel, again with a message from our sponsor. I'll be with you again in a moment with more news and comments.

"Tonight's development in the Brill case blasts sky high City Councilman Bill Muth's misguided effort to pin the crime directly on the Supreme Bench of Baltimore. As a result of tonight's arrest, the local judiciary stands exonerated of any complicity. In a sweeping condemnation of the Bench Muth yesterday laid the blame for the Brill murder directly at the door of the judiciary. The City Council Vice President assailed the local courts for coddling criminals and accused the jurists of excessive leniency, especially in the cases of first offenders. Muth complained that even old offenders are let off with light sentences or suspended sentences and that it was common talk around the Court House that almost any old first offender can have his first offense free—that is, that he can get off without any penalty.

"Muth further stated that in cases where more severe penalities are imposed the sentences are reduced al-

most before the prisoners get their noses inside the penitentiary doors. One thing Muth said was vindicated in a measure. He said he was willing to go out on a limb and bet that, if and when an arrest was made in the Brill case, the prisoner would turn out to be an old offender who had been up before for similar offenses. And, as you know now, that turned out to be the case. *When James, the defendant in the Brill case, was up before for assaulting a ten-year old girl, his sentence was twenty three years. His release recently means, therefore, that he served only about ten years of the original sentence*"[1] (R. 146-151).

The information received by the representative of the United Press was teletyped into the office of the Respondent WCBM, which is a subscriber of the United Press, and at or about 7:45 P.M. to 8:00 P.M. and 8:00 P.M. to 8:02 P.M. on July 8, 1948, there was broadcast over the facilities of the Respondent WCBM the following information which had been received from the representative of the United Press:

"8:00 P.M. & 7:45 P.M. July 8, 1948

*"Baltimore * * * Police Commissioner Hamilton Atkinson announced tonight that the killer of little Marsha Brill is now in custody at the Northern District Police Station. Atkinson identifies the man as 31-year-old Eugene James, a negro handyman, who lives at 3311 Payton Avenue. James was recently released from prison after serving eight years for a series of stabbing attacks on women.*

8:00—8:02 July 8, 1948

"Commissioner Atkinson says Police broke the case shortly after James was taken to the murder scene this afternoon. According to the Police Department

[1] The italicized portion of the broadcast was italicized by the Petitioner in the Answer to the Demand for Particulars by the Respondents WITH and Connolly, for the purpose of informing them of the particular words which, considered with other parts of the publication, amounted to contempt.

head, the colored man showed detectives exactly how he stabbed the little girl to death on Glen Avenue near Park Heights, and then led them to a spot at Key and Whitney Avenues where he said he buried the murder weapon—a large butcher knife.

"James, who is unmarried, has been employed at an apartment house and done odd jobs in the Pimlico neighborhood for several months. *He was released last December from the State Penal Farm after serving eight years on a ten-year sentence for a series of stabbing attacks on women in North Baltimore. He was arrested late Tuesday night after Captain Oscar Lusby of the northern district remembered the earlier cases. Commissioner Atkinson says James also has been linked with an attack on a woman last June 15th in the rear of the 47-hundred block Wabash Avenue. The woman told police her assailant wore a string of beads around his neck. Police say James was wearing beads when arrested Tuesday.*

"James' arrest ends one of the biggest manhunts in Baltimore history. Hundreds of Policemen have been combing the woods in the Pimlico section since Tuesday afternoon when Marsha Brill was dragged from her bicycle and slashed to death Tuesday afternoon.

"The Police Commissioner says no formal charges have been placed against James as yet. Says Atkinson: 'We have only an oral statement. We expect to get a written one later tonight and then we will put the formal charges on the docket.'

"Baltimore * * * Eugene James was formally charged with the murder of eleven-year-old Marsha Brill at 7:45 P.M. tonight. James was docketed at Northern Police Station and taken immediately to police headquarters"[2] (R. 89, 103-104).

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[2] The italicized portion of the broadcast was italicized by the Petitioner in the Answer to the Demand for Particulars by the Respondent WCBM for the purpose of informing it of the particular words which, considered with other parts of the publication, amounted to contempt.

Later during the evening of July 8, 1948, Miss Taggert placed on the teletype operated by United Press for the benefit of its subscribers a dispatch summarizing the information which had been given to or verified for Miss Taggert by Commissioner Atkinson. The dispatch in the following form was received at about 9:45 P.M. by the Respondents WCBM and WFBR and broadcast by them:

> "Baltimore * * * a negro janitor *with a long prison record has been charged with the murder of eleven-year-old Marsha Brill.* The school girl was dragged from her bicycle and stabbed to death last Tuesday afternoon while she and two playmates were on their way home from a picnic.
>
> *"The man charged tonight is 31-year-old Eugene James of 3311 Payton Avenue. James, who is unmarried, has been working as a handyman around a Pimlico apartment house for several months. He was released last September from the State Penal Farm where he had served eight years of a ten-year sentence for stabbing attacks on women in north Baltimore.*
>
> "Police Commissioner Atkinson said James was arrested Tuesday night just a few hours after the brutal murder.
>
> *"Questioned about the arrest, Atkinson said: 'This man had a record. He attacked a 12-year old girl sometime ago.* And we picked up anybody we thought would or could have done this thing.'
>
> *"Atkinson said earlier that Northern District Police broke the case late yesterday afternoon after James was taken to the scene of the crime in the Pimlico section. The man was led through the woods in handcuffs, and when police returned to the station house, they carried a six-inch butcher knife which will be used in evidence.*
>
> "James was charged with the murder at 7:30 o'clock tonight at the Northern Police Station. He also was charged with attacking and robbing a 38-year-old Balti-

more housewife in the 47-hundred block of Wabash Avenue. He is accused of taking five dollars from her.

"When the woman reported the attack, she told police her assailant wore a string of beads around his neck. Police say James was wearing beads when arrested Tuesday.[3]

"The negro was viewed in a police line-up yesterday by the attack victim, and also by eight-year-old Alan Sapperstein and his eleven-year-old sister, Barbara. The Sapperstein children witnessed the savage attack on their playmate, Marsha Brill.

"Police were still questioning James at Headquarters late tonight. Commissioner Atkinson says the man will be arraigned on the murder and rape charges in Northern Police Court at 9 A.M. tomorrow morning.

"Meanwhile, three Washington Detectives are waiting to question him. They have been in Baltimore since Tuesday investigating the parallel between the Brill slaying and a similar one in Washington's Rock Creek Park one week ago last Sunday. In that case, eleven-year-old Carol Bardwell was dragged from her bicycle and slashed to death.

"Atkinson says James denies this crime and contends he has not been in Washington since 1940. The Washington detectives will question him as soon as Baltimore officials are through with him.

"The only clue linking the Baltimore case with the slaying in Washington is an excursion boat badge found in the woods near Pimlico. The badge is a souvenir issued by a Washington Steamerline. It apparently is brand new and was torn from the clothing of someone running through the undergrowth"[4] (R. 22-27, 89, 101-103).

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[3] This paragraph of the dispatch was apparently not broadcast by the Respondent WFBR.

[4] The italicized portion of the broadcast was italicized by the Petitioner in the Answer to the Demand for Particulars by the Respondent WCBM and WFBR for the purpose of informing them of the particular words which, considered with other parts of the publication, amounted to contempt.

All of the broadcasts over the facilities of the Respondents WITH, WFBR and WCBM made by employees of the Respondents WFBR and WCBM and the Respondent Connolly were capable of being heard throughout the City of Baltimore and in many counties of the State, as well as in parts of other States, and were heard by a substantial but indeterminate number of listeners within the City of Baltimore. Substantially similar broadcasts were made by other radio stations located within and without the City of Baltimore, including some stations, the facilities of which are located entirely outside this State but whose signals could be heard in the City of Baltimore and were heard by an indeterminate number of listeners in Baltimore City. Substantially the same information contained in these broadcasts was also published in the newspapers which circulated in Baltimore on the following day, although no newspaper published within the City of Baltimore reported the material complained of in these proceedings (R. 28, 90, 155).

By an order of the Criminal Court of Baltimore entered July 20, 1948 (Niles and Tucker, JJ.), all of the Respondents, together with other corporate defendants, were required to show cause why they should not be adjudged in contempt of court for making and publishing on or about July 9, 1948, by radio broadcast, reports concerning the alleged conduct and actions of one Eugene James, who was then in the custody of the Police Department of Baltimore City accused of the murder of Marsha Brill, an eleven year old child, on or about July 6, 1948 (R. 5, 76, 146). Thereafter, the period of time in which the Respondents were required to show cause was enlarged and each of the Respondents demanded and received particulars of the specific information with which they were charged as having broadcasted and published, as aforesaid, and because of which the citations were issued. In the answers for par-

ticulars, each of the Respondents was informed that the contempt proceedings were based upon Rule 904 of the Rules of the Supreme Bench of Baltimore City and also upon the general power and authority of the courts to issue citations for contempts for the protection of a prisoner's right to a fair trial (R. 9, 81, 151). Answers were filed, and on November 17, 1948, an Order was entered by the Chief Judge of the Court of Appeals of Maryland assigning the Honorable John B. Gray to sit as a Judge of the Criminal Court of Baltimore in the contempt cases then pending (R. 15-16). Judge Gray is not a member of the Supreme Bench of Baltimore City and is a judge in the section of Maryland in which has grown the metropolitan area surrounding the District of Columbia. This Order was followed by an Order entered November 19, 1948, by Judges Niles and Tucker of the Criminal Court of Baltimore in which it was set forth that the Court found that the alleged contempt was not committed in the presence of the Court and, therefore, ordered that the proceedings in connection therewith be transferred to the Honorable John B. Gray, Jr., for hearing and disposition (R. 14).

At the Respondents' trials, in addition to all of the foregoing information relating to the contents of the broadcasts and the circumstances under which they were made, which was stipulated by counsel on behalf of the Court and counsel for all of the Respondents, the testimony of William H. Murphy, Esq., a member of the Baltimore Bar, who was one of the counsel representing Eugene H. James, was presented. Mr. Murphy testified that he was employed to represent James about three days after the murder of Marsha Brill. He represented James at the arraignment on July 13, 1948, at which time he prayed a Court trial (R. 32-33, 171). Over objection on behalf of all the Respondents, Mr. Murphy testified that he prayed a

court trial and cast out consideration of a jury trial because of the extensive publicity given concerning the alleged confession of James and the criminal background of James. He stated that he *"felt that, inasmuch as it was common knowledge throughout the City that James had, allegedly, made a confession, and that he had been previously convicted for crimes somewhat similar to his then present indictment, I did not feel that I could have picked a jury that had not been infected, so to speak, by the knowledge of this man's confession and his criminal background"* (R. 34, 106, 173).

On cross examination, Mr. Murphy stated that he was familiar with the fact that "had he prayed a jury trial he would have been entitled to examine the jurors on their *voir dire* to determine whether or not they had heard any of the broadcasts." Mr. Murphy stated that even though he had that privilege "* * * I felt that I would only sink it (the publicity concerning the confessions and criminal background) deeper into the minds of the people whom I might be examining. Also, in passing on that question, I felt that the information was of such common knowledge that if I examined every possible juror I would probably exhaust the original list and then other lists would have to be obtained, and the same thing would have to be gone all over with again" (R. 36, 107-108, 175). Mr. Murphy testified that the information of his client's alleged confession and his past criminal background was believed by him to be of common knowledge because that information had been broadcast and because he had met innumerable people who had heard those broadcasts (R. 39, 110, 178).

On further cross examination, Mr. Murphy testified that one of the outstanding reasons that caused him to elect a trial by the court rather than a trial by jury was because

of the broadcasting of the information concerning his client's alleged confession and past criminal record (R. 36, 108, 175). When asked if he was aware that the accused in a criminal case had the right to a removal of his case, he answered that he was aware of that right but that he did not seriously consider exercising it because of the nature of the crime and the publicity afforded the information concerning his client. He stated most definitely that he did not consider the point of a jury trial because the publicity had been such that he did not want a jury trial under the circumstances (R. 37-38, 110, 177).

ERRORS BELOW RELIED ON HERE

Petitioner relies on the following point:

The First and Fourteenth Amendments to the Constitution of the United States do not prohibit the imposition of disciplinary action upon the Respondents by the State of Maryland as punishment for their having abridged the right of trial by an impartial jury where the facts arose, and to prevent other abridgments of such a right in cases of broadcasts of similar nature and made under similar circumstances. The broadcasts made by the Respondents under the circumstances of this case, *as a minimum,* satisfy the clear and present danger test required to be met as a condition precedent to a limitation upon freedom of speech and freedom of press. The above point was decided by the Criminal Court of Baltimore in favor of the Petitioner, and was decided by the Court of Appeals of Maryland erroneously in favor of the Respondents.

ARGUMENT

THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DO NOT PROHIBIT THE IMPOSITION OF DISCIPLINARY ACTION UPON THE RESPONDENTS BY THE STATE OF MARYLAND AS PUNISHMENT FOR THEIR HAVING ABRIDGED THE RIGHT OF TRIAL BY AN IMPARTIAL JURY AND TO PREVENT OTHER ABRIDGMENTS OF SUCH RIGHTS IN CASES OF BROADCASTS OF SIMILAR NATURE AND MADE UNDER SIMILAR CIRCUMSTANCES.

At the outset it is appropriate to consider the use which the State of Maryland has made of the inherent power to punish for contempt of court to carry out the duty imposed on it by the Fourteenth Amendment to afford fair and impartial administration of justice. The use of the power to punish, as contempts of court, the doing of acts, and particularly publications, calculated to interfere with and obstruct the administration of justice, is not unique in Maryland jurisprudence. That power was exercised with respect to publications in *Ex parte Sturm*, 152 Md. 114 (1927), where there was published an unauthorized photograph of a prisoner taken in the court room during the course of his trial, and *In re Lee*, 170 Md. 43 (1936), where there was punished the publication of the verdict of the court with respect to one co-defendant, when the Court had concluded to withhold the verdict pending the separate trial of another defendant so as not unduly to influence the jury in the determination which it was about to undertake.

This historic use of power to punish for contempt resulted in the formulation of the Rule of the Supreme Bench of Baltimore, known as Rule 904, applicable only to Baltimore City. It was this Rule in its present form which was held invalid by the Court of Appeals in the instant case because it was declaratory of the "reasonable tendency"

rule which had been in effect when it was promulgated. However, the use of the rule-making power to limit publications in those cases where it is necessary to do so in order to protect the fair and impartial administration of justice has been widely considered by the bench and bar and proposals are pending to make effective rules of court dealing with the subject applicable throughout the State.

The Legislature of the State of Maryland has acquiesced in and approved the exercise of the power to cite and punish for contempt by the courts in order to protect the administration of justice. Although the Legislature has undertaken to limit the power of the courts to punish so-called direct contempt (Section 4 of Article 26 of the Annotated Code of Maryland (1939 Ed.)), it has not undertaken to limit the court's power to punish so-called constructive contempts, including contempts by publication, notwithstanding that the Legislature has amended the statutes relating to the procedure to be followed in contempt cases after the decision in *Ex parte Sturm* and *In re Lee, supra.* The 1949 Legislature after the decision of the Criminal Court of Baltimore herein refused to enact legislation depriving the courts of authority to make rules dealing with publications.

When the practical aspects of the administration of criminal law in Maryland are considered, it appears that there is nothing unduly harsh, summary, oppressive or unusual in dealing with acts calculated to obstruct and deny the fair and impartial administration of justice as contempts of court, rather than as violations of a particular criminal statute. In the ordinary criminal case, Article 21 of the Maryland Declaration of Rights guarantees a trial by jury. A jury may not be had in a proceeding for contempt of court, but it is well settled that a State is not required to furnish jury trials. *Bute v. Illinois,* 333 U. S.

640, 656-657 (1948); *Palko v. Connecticut*, 302 U. S. 319, 324 (1937). However, by statute, Section 107 of Article 5 of the Annotated Code of Maryland (1947 Supp.), full appellate review is afforded to any person convicted of contempt, and the Court of Appeals, the court of last resort in the State of Maryland, is given authority to pass on the law and the facts, and to make such order as it may seem proper to including the right to reverse or modify the order appealed from. In contrast to this wide scope of appellate review, it has been decided that, in the ordinary criminal case, the jury, by virtue of Section 5 of Article 15 of the Maryland Constitution, is conclusively the judge of the law and an accused may not require the trial judge to make a binding instruction to the jury as to what the law is, nor may an accused on appeal from a judgment entered upon a verdict of guilty obtain appellate review to determine what is the law or review the legal sufficiency of the evidence upon which he is convicted. *Slansky v. State*, —— Md. ——, 63 A. 2d 599 (1949).

Thus it appears that by dealing with obstructions to the administration of justice as contempts of court, the State of Maryland has, as a practical matter, afforded wider protection to a person cited for contempt than it would afford to a person accused of violating a criminal statute. A person cited for a constructive contempt is not entitled to a jury trial but is not tried by the judge issuing the citation, and such a person has an unqualified right to have any conviction obtained reviewed by the Court of Appeals both on the law and the facts. Contrasted to these protections are the Maryland rules that a person accused of crime can obtain no review of the law under which he is convicted, nor of the facts supporting his conviction.

In dealing with the cases involving the Respondents, the Court of Appeals placed its conclusion solely on federal

grounds; and, in fact, indicated that it would not have reached the result it did if its understanding and analysis of the decisions of this Honorable Court did not require a reversal of the judgments of the Criminal Court of Baltimore. In dealing with the Federal questions raised, namely, that the power to punish for contempt in the instant cases is prohibited by the First and Fourteenth Amendments of the Constitution of the United States, the Court said: "It is now perfectly clear that whatever the law of the state embodied in its constitution, statutes or judicial decisions, the provisions of the Federal Constitution are supreme" (R. 224). A little later in the opinion, the Court stated: "It is trite to observe that we are bound by the decisions of the Supreme Court construing the Fourteenth Amendment" (R. 226). Finally, after an analysis of the decisions of this Honorable Court, the Court of Appeals concluded: "We simply hold that upon this record, the broadcasts did not create such a clear and present danger as to meet the constitutional test" (R. 231).

A fair reading of the majority opinion of the Court of Appeals thus shows that its decision was reached solely on what it is contended was its misunderstanding and misinterpretation of the decisions of this Honorable Court in *Bridges v. California*, 314 U. S. 252 (1941), *Pennekamp v. Florida*, 328 U. S. 331 (1946), and *Craig v. Harney*, 331 U. S. 367 (1947). In view of this result, an analysis of the real and actual proposition which those cases establish and the proper application thereof to the facts of the case at bar is required.

Bridges v. California established as part of the law of contempt by publication, the clear and present danger test, because the exercise of the power to punish for contempt has the effect of limiting the freedom of speech and

press guaranteed by the First and Fourteenth Amendments to the Constitution of the United States. It did so particularly in the absence of a legislative finding by the State of California regarding the obstructive nature of the publications and their deleterious effect on the fair and impartial administration of justice. Such legislative finding is, in effect, present in the instant case, because, as has been shown, the Legislature of the State of Maryland has acquiesced in and approved of the use of the power to punish for contempt by the courts as a means of preventing obstructions to and denials of the fair and impartial administration of justice; and an analysis of the practical effects of the use of the power to punish for contempt shows that, rather than being unusual, summary or oppressive, it affords to the alleged contemnor more advantages than are afforded to a person charged with violation of a criminal statute.

The *Bridges* case stressed that the fair and impartial administration of justice was paramount to freedom of speech and freedom of the press in those cases where a conflict between the two principles occurred. It was held, however, that before freedom of speech and freedom of the press could be limited, there must appear a great likelihood of a substantial evil and those factors were to be determined by considering the particular publications and the circumstances under which the publications were made.

In reversing the convictions for contempt of court in the *Bridges* case, the Court was unanimous in holding that two of the editorials in question had such a slight effect on the course of justice that they could be dismissed as negligible. The Court split, however, on the effect of a third editorial and the Bridges' telegram threatening a strike; and the point of departure between the majority of the Court and

those dissenting was the degree of moral resistance which could be expected *of the Judge* whom the publications would effect.

In the *Pennekamp* case, the Court was unanimously of the opinion that the editiorials in question, which had been found by the State court to be grossly and intentionally misleading with respect to certain criminal cases and which finding was accepted by this Court, did not constitute a clear and present danger to the orderly operation of the courts and the fair and impartial administration of justice; because, under all of the circumstances, the criticism which *the Judge* could expect and his resistance to withstand such criticism was sufficient to outweigh the possibility of his being affected by the adverse publicity.

In *Craig v. Harney,* where a newspaper publication severely criticised the action of *a Judge,* the publication was held not to constitute a clear and present danger to the administration of justice, and hence the conviction was reversed. Again the point of departure between the majority of the court and those dissenting was the peculiar ability of a Judge to render a decision uncoerced and to remain unaffected by this type of outside influence.

It appears thus from all three of the cases that in each the alleged contempt was directed at a member of the judiciary and not to a prospective jury as in the instant case, and that the basis of split between the members of the court was the ability of Judges as men of tougher fibre than members of the lay public to withstand being influenced, intimidated or coerced by adverse publicity and threats. All of these cases appear to recognize the difference between Judges and jurors in determining whether any particular publication constitutes a clear and present danger to the fair and impartial administration of justice.

In the *Bridges* case, in referring to one of the editorials, a majority of the court said, "To regard it, therefore, as in itself of substantial influence upon the course of justice would be to impute to judges a lack of firmness, wisdom, or honor—which we cannot accept as a major premise." 314 U. S. 252, 273. Mr. Justice Frankfurter, dissenting in the same case, stated, "If it is true of juries, it is not wholly untrue of judges that they too may be 'impregnated by the environing atmosphere'." 314 U. S. 252, 300.

In the *Pennekamp* case, the Court was extremely careful to point out that the editorials concerned comments made about Judges of courts. The Court was also careful to point out that, with respect to the editorials, "their effect on juries that might eventually try the offenders against the criminal laws of Florida is too remote for discussion."

In the *Craig* case, the majority of the Court, in its reference to an editorial which denounced the Judge and tried to intimidate him into granting a new trial in a landlord and tenant case, after he had required a recalcitrant jury to render a directed verdict, stated, "Judges are supposed to be men of fortitude, able to thrive in a hardy climate." Notwithstanding that it clearly appears that the decisions in the *Bridges, Pennekamp* and *Craig* cases rest substantially, if not exclusively, on differences in moral fibre, actual or supposed, between judges and members of the lay public, the majority of the Court of Appeals of Maryland blindly applied the rule of those cases to juries and stated:

> "It is suggested that the Supreme Court, which has not hesitated to extend the constitutional protection to procedural process, might take a different view where juries or potential juries are concerned, rather than trial judges. The distinction is hardly tenable. Judges are not so 'angelic' as to render them immune

to human influences calculated to affect the rest of mankind. Conversely, while juries represent a cross-section of the community, it cannot be denied that in every community there are citizens who by training and character are capable of the same firmness and impartiality as the judiciary. It is plainly a matter of degree. The dissenting opinions argue that neither judges nor juries can remain unaffected by comments and recriminations while a case is pending. This contention did not prevail, even in cases where the statements threatened the judges with retaliations, if they should reach a particular decision. Granted that the decisions are not directly in point, they seem to go further that we are required to do in the case at bar" (R. 226-227).

Thus the Court of Appeals not only decided a point of law which has never been considered by this Court, but undoubtedly did so in a manner directly opposite from that which this Court would probably decide, as indicated by its past opinions, because it applied to jurors, a test which this Court has applied only to judges and then only because this Court considered judges to constitute a separate and distinct category of trained and tempered persons who are peculiarly immune to outside influence.

When the clear and present danger test is correctly applied to the facts of the instant case, a different result from that reached by the Court of Appeals is obviously required. The *Bridges, Pennekamp* and *Craig* cases admonish us that freedom of speech and freedom of the press cannot be regulated unless it appears that untrammeled exercise of these freedoms would result in great likelihood of a substantive evil. The determination of the likelihood and the determination of the substantive evil rest on factors which may be deduced from considering the particular utterances and the circumstances under which they are made.

That the evil sought to be prevented in the case at bar is a substantial one cannot be doubted. By Article 21 of the Maryland Declaration of Rights, the State of Maryland has guaranteed "That in all criminal prosecutions, every man hath a right * * * to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty." Article 20 says that "the trial of facts, *where they arise,* is one of the greatest securities of the lives, liberties and estate of the People." It is not denied that there is nothing contained in the Constitution of the United States which requires the State of Maryland to afford to an accused the right guaranteed in Article 21 of the Maryland Declaration of Rights, *Bute v. Illinois,* 333 U. S. 640, 657 (1948); *Palko v. Connecticut,* 302 U. S. 319, 324 (1937). However, while the States are free to work out within the concept of due process of law their own methods for the administration of criminal law, yet when any particular method has been chosen, it is subject to all of the restrictions contained in the Fourteenth Amendment, including the prohibition against a denial of procedural due process of law, *Bute v. Illinois,* 333 U. S. 640 (1948); *Fay v. New York,* 332 U. S. 261 (1947); *Adamson v. California,* 332 U. S. 46 (1947); *Buchalter v. New York,* 319 U. S. 427 (1943); *Chambers v. Florida,* 309 U. S. 227 (1940); *Moore v. Dempsey,* 261 U. S. 86 (1925). Thus, the State of Maryland, once having guaranteed the right to a jury trial in the area where the facts arise, is faced with the necessity of affording that right in a manner consistent with all of the elements of due process of law. The State of Maryland cannot arbitrarily, capriciously or discriminatorily deny the right of trial by impartial jury of the vicinage to any person or any group of persons nor, it is submitted, can it, consistent with squarely meeting its constitutional obligation, permit other persons arbi-

trarily, capriciously and viciously to force an accused to give up his right. In effect, therefore, the State of Maryland, in the case at bar, has undertaken, through the use of the power inherent in its courts, to cite and punish for contempt, to insure to an accused procedural due process of law with respect to his right to a trial by an impartial jury, at the place the crime occurred and to punish for any denials of that right, occasioned by the doing of acts by other persons calculated to deny and obstruct that right.

That the broadcasts made by the Respondents, *as a minimum*, brought about a great likelihood of the substantive evil of denial to the accused, Eugene H. James, of his right to a trial by an impartial jury, likewise cannot be denied. These broadcasts saturated the area from which the jurors to whom James was entitled would be selected with the very knowledge of facts of which they could gain knowledge only at his trial, and only under the direct supervision of a court and strict application of constitutional and evidenciary principles. In addition, they informed those prospective jurors of facts which, under no conceivable rule of evidence, would be admissible at James' trial, and which, under the doctrines of any court, if made known during the course of the trial, would have required reversal of any conviction obtained.

For example, the broadcasts clearly informed the population of the City of Baltimore, as well as of most, if not all, of the State, that James had confessed. The use of confessions in criminal prosecutions has recently been reexamined by this Court, and strict constitutional doctrines laid down regarding the use depending upon how they were obtained, *Watts v. Indiana*, ... U. S. ..... (1949) (No. 610, October Term, 1948); *Turner v. Pennsylvania*, ... U.

S. ..... (1949) (No. 107, October Term, 1948); *Harris v. South Carolina,* ..... U. S. ..... (1949) (No. 76, October Term, 1948); *Lisenba v. California,* 314 U. S. 219 (1941); *White v. Texas,* 310 U. S. 530 (1940); *Chambers v. Florida,* 309 U. S. 227 (1940). Knowledge of a confession improperly obtained would not only necessitate reversal of any conviction obtained as a matter of the law of evidence, *but as a matter of constitutional right.* Thus the restraint with which the fact of the existence of a confession should be handled is made obvious. Such fact, if an accused is to obtain a fair and impartial trial, must be made known only in the forum of a courtroom, where there is present a Judge cognizant of the law of evidence and constitutional law relating to confessions, able to apply such law, and able to afford to an accused all of his constitutional rights.

While the other facts made known by the Respondents' broadcasts,—that James was not mentally unsound, that he had been convicted of other crimes, that he had served other sentences, and that he had confessed to other crimes, —may not all be subject to the same constitutional restrictions which are applicable to his confessions of the crimes with which he was charged, yet they provide absolutely no direct evidenciary basis under the decisions of any court on which he could be found guilty of a separate, unrelated crime. That such facts are not evidence of other crimes and are clearly inadmissible in a prosecution of the type conducted against James, rests in the universal and long-standing recognition (1) that they have no probative force in showing guilt of another crime, and (2) that improper knowledge of such facts irrevocably and irresistably constitutes actual prejudice against an accused.

While this Court has not had occasion to pass upon whether or not broadcasts of the type made by Respondents

would prejudice an accused, other courts have had little difficulty in reaching that result with respect to other publications. It is true that some of the decisions of other courts were reached under the reasonable tendency doctrine of *Toledo Newspaper Co. v. United States,* 247 U. S. 402 (1918), yet it is to be remembered that the difference between the reasonable tendency rule and the clear and present danger rule is a matter of degree and not of kind. Thus, the decisions in *Patterson v. Colorado,* 205 U. S. 454 (1907), *In re Independent Publishing Co.,* 240 Fed. 849 (C.C. A. 9, 1917), *Telegram Newspaper Co. v. Commonwealth,* 172 Mass. 294, 54 N. E. 445 (1899) (Opinion by Fields, C. J., concurred in by Mr. Justice Holmes), *Globe Newspaper Co. v. Commonwealth,* 188 Mass. 449, 74 N. E. 682 (1905), *State v. Howell,* 80 Conn. 668, 69 A. 1057 (1908), *Tate v. State,* 132 Tenn. 131, 177 S. W. 69 (1915), *Herald-Republican Publishing Co. v. Lewis,* 42 Utah 188 (1913), are highly persuasive of the result that the effect of the Respondents' broadcasts, in making known to the prospective jurors on whom James had a right to draw, the facts contained in the broadcasts made by them, were highly prejudicial to James. Likewise the English Courts have never had any difficulty in determining that publication of the fact of a confession prior to trial constitutes irrevocable prejudice to an accused, *Rex v. Parke* (1903), 2 K. B. 432; *Rex. v. Clarke, ex parte Crippen* (1910, K. B. D.), 103 L. T. R. 636. As recently as March 25, 1949, the Lord Chief Justice of England fined the Daily Mirror Ten Thousand Pounds and sent its editor to prison for three months for publishing a story about a murder case in which the accused was described as a vampire and in which it was reported not only that he was charged with a particular murder, but that he had committed other murders and gave the names of the persons whom he had murdered.

In short, it is impossible to conclude otherwise than that the publications made by the Respondents not only had great likelihood, but, as found by the trial court, actually prejudiced any prospective jury against the accused. Thus, it clearly appears that the substantial evil of a denial of due process of law was occasioned and brought about by the Respondents' broadcasts, and their inescapable effect upon prospective jurors. That the Court of Appeals concluded otherwise, it is submitted, was the gravest error.

The Court of Appeals went even further in misconstruing and misapplying the clear and present danger test. At the conclusion of the majority opinion, it is stated:

> "The State erroneously contends, however, that the question is not whether there is a showing of prejudice as to vitiate a trial, but whether the statements were reasonably calculated to influence a potential jury. We should have grave difficulty in holding that the same statements that would not be so prejudicial as to require the reversal of a death sentence, could still be so prejudicial as to support convictions for contempt" (R. 230-231).

In effect the Court of Appeals said that, unless the State could prove that James had been denied an impartial trial by jury to the extent that his conviction and the judgment of death by hanging entered thereon, could be reversed, the State was without authority under the First and Fourteenth Amendments to the Constitution of the United States to limit or to punish in any manner, the publications made by these particular Respondents. The court is silent as to how the State could possibly have proven that a fair trial was not had because of prejudiced jurors when, in fact, trial by the court without the intervention of a jury took place. Aside from this logical difficulty, however, it

clearly appears that the Court of Appeals was impressed with the notion that the clear and present danger test necessarily requires proof of actual prejudice. No authority is cited for this statement, and it is submitted, no authority can be found for such a proposition in any of the prior decisions of this Court. It seems elementary enough that the necessity of exploring the intricacies of the clear and present danger test is brought about because it is recognized that the proof necessary to justify a regulation or limitation on freedom of speech and freedom of the press falls short of proving actual prejudice.

It should be remembered that the Criminal Court of Baltimore found actual prejudice upon an agreed statement of facts and testimony of actual prejudice given by counsel to the accused, Eugene H. James. Even though this Court might not concur in such a finding by the Criminal Court of Baltimore, it is confidently submitted that the proof that was adduced was clearly sufficient to meet and satisfy the clear and present danger test.

CONCLUSION

Whether an accused be a member of a minority group against whom popular prejudice, difficult to combat, is mounted, or whether he be a member of a majority against whom such difficulties are not encountered, it is the touchstone of American democracy as buttressed by the decisions of this Court, that the particular procedure adopted by the State of Maryland, in administering its criminal law shall be applied fairly and impartially and that justice be administered orderly and without prejudice. There is also a grave obligation imposed on the State of Maryland not to infringe upon the guarantees of freedom of speech

and freedom of the press. But the decisions of this Court teach us that where a conflict ensues between these two principles, the fair and impartial administration of justice must prevail. That this duty on the State of Maryland must give rise to a means of carrying out the State's obligation is recognized; and the authority of the State to punish for impediments and obstructions to the fair, orderly and impartial administration of justice, and to prevent further obstructions and impediments thereto comes into play when, *as a minimum*, there can be shown a clear and present danger to the fair, orderly and impartial administration of justice.

The Court of Appeals of Maryland has denied the power to the State of Maryland to punish in the instant case the Respondents for making the broadcasts under the circumstances involved herein. It has done so solely because it has failed to comprehend and properly apply the clear and present danger test. It is confidently submitted that it has been shown on the basis of the foregoing that a proper understanding and proper application of the clear and present danger test do not admit of the result reached by the Court of Appeals.

It is respectfully submitted, therefore, that this case, involving as it does the serious claim that the fair, orderly and impartial administration of justice is being subverted to an alleged freedom of speech and freedom of the press, a claim which denied to an accused, a member of a minority group, his constitutional rights and to the State of Maryland the necessary means and authority to carry out the clear-cut obligation placed on it, calls for the exercise by this Honorable Court of its supervisory powers to the end that the rights guaranteed to the accused, and the means

of carrying out the obligations imposed on the State under the Federal Constitution shall be respected and preserved.

Respectfully submitted,

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